SELECTED GUIDELINE APPLICATION DECISIONS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Prepared by the
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CHAPTER ONE: *Introduction and General Application Principles*

Part B General Application Principles

§1B1.3 Relevant Conduct (Factors that Determine the Guideline Range)

United States v. Childress, 58 F.3d 693 (D.C. Cir. 1995). Seven defendants convicted of a drug conspiracy appealed their sentences on the ground that the district court erroneously attributed 50 kilograms of cocaine to each appellant on the basis of its general findings that the conspiracy involved more than 50 kilograms of cocaine. The District of Columbia Circuit held that the district court erred in failing to make individualized findings about the scope of each appellant's conspiratorial agreement and the evidence that led it to conclude in each of their cases that the 50 kilos distributed were reasonably foreseeable. *Id*. at 162. The court instructed that, in applying USSG §1B1.3 and the theory of co-conspirator liability, a district court must make particularized findings that (1) the defendant's conduct was within the scope of that defendant's conspiratorial agreement, and (2) that it was reasonably foreseeable. With respect to firearms, the court further explained that "findings that a defendant handled . . . extensive quantities of drugs in the course of a conspiracy are adequate to support the conclusion that the use of guns by co-conspirators was reasonably foreseeable to him." *Id*. at 725.

United States v. Foster, 19 F.3d 1452 (D.C. Cir. 1994). The district court properly enhanced the defendant's base offense level for possession of a dangerous weapon pursuant to USSG §2D1.8(a)(1). The defendant challenged the inclusion of the weapon possession as relevant conduct because the district court granted his motion for judgment of acquittal on the 18 U.S.C. § 924(c)(1) count. The District of Columbia Circuit joined ten other circuits in concluding that acquitted conduct may be used to determine sentencing enhancements.

United States v. Pinnick, 47 F.3d 434 (D.C. Cir. 1995). The district court properly included conduct from two dismissed counts as relevant conduct for sentencing, and erred in including the conduct from a third dismissed count. The defendant pleaded guilty to one of four counts of fraud, and the government dismissed the other three counts. Two of the dismissed counts involved counterfeit checks, and were properly included by the district court as relevant conduct at sentencing. The other dismissed count involved the defendant's fraudulent use of a credit card. The circuit court noted that in fraud offenses conduct from dismissed counts which is part of "the same course of conduct" may be considered when determining a guideline range for the offense of conviction. In determining what constitutes "the same course of conduct," the court must consider several factors including "the degree of similarity of the offenses and the time interval between the offenses." Where the defendant's offense of conviction and the acts offered as relevant conduct can be "separately identified" and are of a different "nature," the conduct will not be considered as part of the same course of conduct. The government must demonstrate a connection between the conduct and the offense of conviction; not between the conduct and other relevant conduct. The

circuit court ruled that the government failed to demonstrate a connection between the credit card fraud and the offense of conviction. The sentence was vacated and the case was remanded for resentencing.

United States v. Vizcaino, 202 F.3d 345 (D.C. Cir. 2000). The District of Columbia Circuit held that, because the defendant had failed to request a downward departure at sentencing, he did not preserve the issue for review on appeal, and that the district court did not commit plain error by failing to grant the departure *sua sponte*. The defendant had been indicted for possession with intent to distribute both crack cocaine and powder cocaine. The defendant entered into a plea agreement with the government in which he pled guilty to the powder cocaine charge and took responsibility for 185 grams of crack cocaine in exchange for the Government dropping the crack cocaine charge. The crack cocaine was treated as relevant conduct pursuant to USSG §1B1.3(a)(2) and increased the defendant's sentencing range from 27 to 33 months to a range of 121 to 151 months. *Id*. at 346. During the sentencing hearing, the defendant explained that he had entered into the plea agreement to avoid the mandatory minimum associated with crack cocaine. *Id*. at 346. The district court responded that it was bound by the guidelines and had no grounds on which to depart. *Id*. at 346. On appeal, the defendant raised the argument, which he did not raise at the sentencing hearing, that he was entitled to a downward departure under USSG §5K2.0 because the consideration of relevant conduct drastically distorted his sentence. *Id*. at 347. Because the defendant did not ask the district court for a downward departure or argue that his sentence had been so distorted as to remove it from the guidelines' heartland, the circuit court held that the issue had not been preserved for appeal. *Id*. at 348. Thus, the court reviewed the district court's failure to depart *sua sponte* for plain error. *Id.* at 348. Although other circuits had held that drastic distortion of a sentence due to inclusion of relevant conduct was a grounds for departure under USSG §5K2.0, the District of Columbia Circuit and the Supreme Court had not had occasion to consider the issue. *Id.* at 348. The court held that, in the absence of binding authority or a clear legal norm, the district court's failure to depart could not constitute plain error, and affirmed the defendant's sentence. *Id.* at 348.

United States v. Williams, 216 F.3d 1099 (D.C. Cir. 2000). The defendants were convicted of receiving bribes in violation of federal law and, on appeal, they challenged the relevant conduct attributed to them in the calculation of their sentences. Both defendants were motor vehicle inspectors and were part of a scheme to sell inspection stickers to cab drivers in the District of Columbia. *Id.* at 2201. At sentencing, the district court assumed that each defendant joined the scheme as soon as he began working at the inspection station instead of making a particularized finding to determine when each of the codefendants actually joined the conspiracy. Thus, the district court held each defendant responsible for all of the illegal proceeds earned the day after they began working at the inspection station despite the fact that there was no evidence that either joined until later in the conspiracy. The court held that this calculation constituted clear error. *Id*. at 1104. The court calculated the bribe amounts based on the years each codefendant had been involved. The result was that one defendant's bribe amount was reduced by only $4,700, an amount that would not affect his sentence, and the court held that the error as to his sentence was harmless. *Id*. at 1105. The other defendant would have received a reduction in his amount by at

least $24,000. Because this amount could affect his sentence, the court remanded for further proceedings and re-sentencing. *Id.* at 1105.

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against the Person

§2A4.1 Involuntary Manslaughter

United States v. Yelverton, 197 F.3d 531 (D.C. Cir. 1999). The District of Columbia Circuit held that the district court did not err by applying an enhancement under USSG §2A4.1(b)(3) for use of a firearm, where the use of the firearm was portrayed in a photograph and was accompanied by threats of further violence to the mother of the kidnap victim in an effort to obtain ransom. The defendant was convicted for kidnaping, abduction and unlawful restraint and sentenced under USSG §2A4.1, including an enhancement under (b)(3) because a firearm was "otherwise used" in the commission of the offense. *Id.* at 533. The definitions to the guideline indicated that "otherwise used" meant that the use of the weapon did not amount to discharging but was more than brandishing. *Id.* at 533. The defendant argued that for the enhancement to apply, the gun must be used upon the same victim that is being coerced into acting and that showing the photograph to the mother amounted only to "brandishing." *Id.* at 533. The court noted that virtually all of the circuits have held that where a weapon and threats are used to engender fear and facilitate the commission of a crime, the enhancement is warranted even if the target of the threat and the person forced into compliance are not the same individual. *Id.* at 533. The distinction in the defendant's case is that the gun and the threats "were directed at two different people in two different locations at two different times." *Id.* at 534. The defendant conceded that the enhancement would apply if the gun holder increased the threat of injury to those in his presence, but the court found no reason to read the term "otherwise used" so narrowly. *Id.* at 534. Because the defendant explicitly threatened to the mother that the gun would be used to harm her son if she did not comply, the court upheld the enhancement to the defendant's sentence. *Id.* at 535.

Part D Offenses Involving Drugs

§2D1.1 Unlawful Manufacturing, Importing, Exporting, Trafficking (including Possession with Intent to Commit These Offenses)

United States v. Young, 247 F.3d 1247 (D.C. Cir. 2001). In 1991, the defendant was convicted for conspiracy to manufacture and distribute phencyclidine (PCP) and sentenced under USSG §2D1.1. In 1998, the defendant filed a motion pursuant to 18 U.S.C. § 3582(c)(2), which permits a court to reduce a previously imposed sentence if the sentence has subsequently been lowered by the Sentencing Commission. The defendant argued that Amendment 484, which altered Application Note 1 to USSG §2D1.1 and went into effect on November 1, 1993, should result in a reduction to his sentence. Amendment 484 specified that, for the purposes of the drug table, a "mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used." *Id.* at 1250. The defendant's motion was

denied because the defendant was not sentenced under Application Note 1 but under Application Note 12 which applies when the quantity of drugs seized does not reflect the seriousness of the offense. The court held that the defendant was sentenced correctly under Application Note 12, considering his capacity to produce pure PCP in addition to the PCP in his possession. The district court also concluded that amendment 484 would not affect the calculation of the defendant's sentence because a precursor chemical would ordinarily need to be separated out prior to using the controlled substance. The court upheld the district court's denial of the defendant's motion.

§2D1.2 Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy

United States v. Mathis, 216 F.3d 18 (D.C. Cir.), *cert. denied*, 531 U.S. 972 (2000). The defendant was convicted of conspiracy to distribute and possession with intent to distribute heroin and cocaine. On appeal, the defendant challenged a two-level enhancement under USSG §2D1.1(b)(1) for possession of a dangerous weapon during the commission of a drug offense. The district court found that a loaded firearm recovered from the getaway vehicle had been possessed by a co-conspirator during the drug transaction. The court held that application of the enhancement to the defendant was not clear error because it was foreseeable that the co-conspirator would be carrying a firearm during a large scale drug transaction. *Id.* at 27 (citation omitted).

Part K Offenses Involving Public Safety

§2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

United States v. Bowie, 198 F.3d 905 (D.C. Cir. 1999). The defendant was convicted by a jury of three charges including one count for possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1), and two counts for assaulting a police officer while armed with a dangerous weapon, in violation of District of Columbia Code. *Id.* at 907. On appeal, the defendant challenged upward adjustments under USSG §3A1.2, "official victim," and under USSG §2K2.1(b)(5), possession of a firearm in connection with another felony. *Id.* at 913. The defendant argued that the "official victim" enhancement was unwarranted because he did not cause a "substantial risk of bodily harm" to the officers. *Id.* at 913. Likewise, he argued that the second enhancement was unjustified because he did not use his firearm during the assault. *Id.* at 913. The district court found that the defendant attempted to pull his gun from his waistband during the assault thereby creating a substantial risk and indicating his intent to use his weapon to facilitate the assault. *Id.* at 913. The court held that both enhancements were justified by the evidence and affirmed that portion of the sentence. *Id.* at 913.

Part L Offenses Involving Immigration, Naturalization, and Passports

§2L1.1 Smuggling, Transporting, or Harboring an Unlawful Alien

United States v. Yeh, 278 F.3d 9 (D.C. Cir. 2002). The defendants were convicted of bringing unauthorized aliens into the United States for financial gain. On appeal, one of the defendant disputed the district court's application of a two-level increase pursuant to USSG §2L1.1(b)(1) for "intentionally or recklessly creating a substantial risk of death or serious bodily injury" to the aliens aboard the vessel. Applying a plain error standard because the defendant failed to raise his objection in the district court, the District of Columbia Circuit rejected the defendant's contention that he had no control over the conditions aboard the vessel. The record indicated that the defendant admitted in district court that he was responsible and received compensation for keeping order and for distributing food and water to the aliens. It also indicated that the aliens had suffered without food or water for at least several hours by the time the Coast Guard arrived and that conditions below deck were appalling.

Part S Money Laundering and Monetary Transaction Reporting

§2S1.1 Laundering of Monetary Instruments

United States v. Kayode, 254 F.3d 204 (D.C. Cir. 2001). The District of Columbia Circuit held that laundering funds derived from defrauding federally insured financial institutions fell within the "heartland" of USSG §2S1.2. The defendant was convicted on eight charges, including one count of conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h). The defendant's sentence for this count was calculated under USSG §2S1.2, but she argued on appeal that she should have been sentenced under the fraud or money structuring guideline, §2F1.1. The defendant asserted that USSG §2S1.2 was intended to apply to laundering of proceeds from drug trafficking or serious organized crime, not proceeds from bank fraud, as was the case here. Because laundering funds from bank fraud would not be "atypical" under this guideline, the defendant argued that the court should have departed and used the less severe guideline. The circuit court held that laundering funds derived from defrauding federally insured financial institutions fell within the "heartland" of USSG §2S1.2 and upheld the sentence. The application note to USSG §2S1.2 specifies illegal activity as that covered by 18 U.S.C. § 1956(c)(7) and racketeering. Racketeering is defined in 8 U.S.C. § 1961(1) as including acts indictable under 18 U.S.C. § 1344, financial institution fraud. Because the court found that the defendant's behavior fell within the heartland of USSG §2S1.2 under the 1998 Guidelines Manual, the effect of Amendment 591, effective November 1, 2000, was not considered.

Part T Offenses Involving Taxation

§2T1.1 Tax Evasion

United States v. Hunt, 25 F.3d 1092 (D.C. Cir. 1994). The circuit court joined the majority of courts of appeals in rejecting the defendant's argument that tax loss, for sentencing purposes, should not include the amount the defendant "attempted to evade" from the government, but rather should only reflect the amount of money actually lost by the government in the form of fraudulently obtained funds or reduction in taxes paid. Although the defendant's approach was effectual in United States v. Schmidt, 935 F.2d 1440 (4th Cir. 1991), the weight of authority is to the contrary.

CHAPTER THREE: *Adjustments*

Part A Victim-Related Adjustments

§3A1.2 Official Victim

See United States v. Bowie, 198 F.3d 905 (D.C. Cir. 1999), §2K2.1, p. 4.

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. McCoy, 242 F.3d 399 (D.C. Cir.), *cert. denied*, 122 S. Ct. 166 (2001). The defendant argued that the two-level enhancement she received for being an "organizer, leader, or manger," pursuant to USSG §3B1.1(c), was inappropriate because, as the Presentence Report reported, those that she directed were "unwitting participants." *Id.* at 410. The court agreed that the participants must have known of the criminal activity in order to be considered criminally responsible participants as required by USSG §3B1.1(c). *Id.* at 410. Therefore, the court remanded for further proceedings with respect to the aggravating role enhancement and affirmed the rest of the sentence. *Id.* at 411.

United States v. Wilson, 240 F.3d 39 (D.C. Cir. 2001). The District of Columbia Circuit held that the court should inquire solely into the number of people involved in the activity in determining whether criminal activity is "otherwise extensive" for the purposes of a USSG §3B1.1(a) enhancement. Following a conviction for bank fraud and various related offenses, the defendant was sentenced to 51 months' imprisonment, followed by a term of 3 years' supervised release. *Id.* at 42-43. The defendant challenged the two-level enhancement under USSG §3C1.1 for obstruction of justice on the grounds that statements made were not material to the subject matter of the hearing. *Id.* at 46. The defendant then challenged the district court's determination that he was an "organizer or leader" and that he organized criminal activity that was "otherwise extensive" for purposes of an enhancement under USSG §3B1.1(a). *Id.* at 46. The court upheld the finding that the defendant was an "organizer or leader" because of evidence that he had decision making authority, recruited others, and claimed a larger share of the proceeds. *Id.* at 46-

47.[1] The Court elected to use the test which relied on the number of individuals involved in the criminal activity. This test demands that "an activity [was] the functional equivalent of an activity involving five or more participants," and carries the implication that it must include at least five participants meet that standard. *Id.* at 50. The court vacated the portion of the sentence based upon the "otherwise extensive" finding because the unknowing participants performed ordinary and automatic duties, such as opening credit card accounts, and could not be included under factors set forth in Corrozzella.

§3B1.2 Mitigating Role

United States v. Mathis, 216 F.3d 18 (D.C. Cir.), *cert. denied*, 531 U.S. 972(2000). The defendant was convicted of conspiracy to distribute and possession with intent to distribute heroin and cocaine. On appeal, the defendant argued that he should have received a minor role reduction under USSG 3B1.2(b) because his level of participation was no more than that of a "messenger" or "gopher." *Id.* at 26. The district court found, however, that the defendant had been involved in phone calls in which he and others "discussed, planned, and arranged" a large drug delivery. *Id.* at 26. The court held that the denial of the reduction was not clearly erroneous. *Id.* at 26.

United States v. Olibrices, 979 F.2d 1557 (D.C. Cir. 1992). The defendant pled guilty to one count of conspiracy to distribute and possess with intent to distribute cocaine, in violation of 18 U.S.C. § 371. At the sentencing hearing, the district court determined that the defendant was responsible only for the quantity of drugs in the single transaction and was not responsible for the quantity of drugs distributed by the entire conspiracy. In addition, the district court determined that the defendant was not entitled to a mitigating role adjustment pursuant to USSG §3B1.2 because the defendant was a major participant in the crime of conviction upon which the base offense level was calculated. The district judge sentenced the defendant to 51 months' incarceration. On appeal, the District of Columbia Circuit upheld the district court's denial of a USSG §3B1.2 adjustment because the larger conspiracy was not taken into account in establishing the base level. "To take the larger conspiracy into account only for purposes of making a downward adjustment in the base level would produce the absurd result that a defendant involved both as a minor participant in a larger distribution scheme for which she was not convicted and as a major

[1]The circuits have split regarding the test to determine whether criminal activity was "otherwise extensive." Some circuits examine the totality of the circumstances; some focus on the number of individuals involved. *Id.* at 47. The court chose to follow the test enunciated by the Second Circuit in United States v. Corrozzella, 105 F.3d 796 (2d Cir. 1997), and adopted by the Third Circuit in United States v. Helbling, 209 F.3d 226, 224-45 (3d Cir. 2000), which allows the court to: "(1) the number of knowing participants; (2) the number of unknowing participants whose activities were organized or led by the defendant with specific criminal intent [as opposed to mere service providers]; and (3) the extent to which the services of the unknowing participants were peculiar or necessary to the criminal scheme [rather than fungible with others generally available to the public]." 240 F.3d at 47.

participant in a smaller scheme for which she was convicted, would receive a shorter sentence than a defendant involved solely in the smaller scheme." *Id*. at 1560.[2]

§3B1.3 Abuse of Position of Trust or Use of Special Skill

United States v. Robinson, 198 F.3d 973 (D.C. Cir. 2000). The defendant, president of a school for emotionally disturbed children, was convicted after a jury trial on 11 counts of defrauding the District of Columbia school system by misappropriating funds and using his position to facilitate bank fraud. *Id.* at 976. The circuit court upheld the district court's sentencing enhancement for abuse of a position of trust based on the defendant's job title and position, control over the finances, managerial discretion, and lack of outside supervision. *Id.* at 978. The defendant also alleged that the district court double counted certain liabilities when it calculated restitution. *Id*. at 979. The defendant did not raise the issue at sentencing and the court only reviewed it for plain error. *Id*. The defendant was paid by the school system for services rendered, and he was in turn responsible for hiring employees and leasing space. *Id.* at 979. Because the lease and employment contracts were separate from the school contract, the school system would not necessarily be held accountable for the payment of these contracts. *Id*. Therefore, the court held that the defendant's double counting argument did not establish plain error. *Id*. The court affirmed the sentence and the amount of restitution, but directed the restitution to be reduced by $13,000 due to a computational error. *Id*.

United States v. Smaw, 22 F.3d 330 (D.C. Cir. 1994). The district court, on resentencing, erred in enhancing the defendant's sentence for abuse of a position of trust. The defendant used her position as a time and attendance clerk to retrieve personal employee data in order to obtain credit cards fraudulently. At the resentencing, the district court noted that amended commentary to USSG §3B1.3 would become effective shortly thereafter, which provided a definition of "public or private trust." The district court did not consult the amendment and applied the enhancement, but expressed doubt as to whether the enhancement was appropriate. The circuit court concluded that the amended commentary excluded the defendant's position from the definition of a position of trust, and that to hold otherwise would result in "converting `the position of every person who handles property into one of trust.'" United States v. Cuff, 999 F.2d 1396, 1398 (9th Cir. 1993). The circuit court additionally noted that the commentary must be given controlling weight based on United States v. Stinson, 508 U.S. 36 (1993), on remand, 30 F.3d 121 (11th Cir. 1994), and on appeal after remand, 97 F.3d 466 (11th Cir. 1996), and *cert. denied*, 519 U.S. 1137 (1997). The

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[2]This issue is currently the subject of a circuit conflict. Seven other circuits have agreed with the D.C. Circuit on this issue. United States v. Gomez, 31 F.3d 28, 31 (2d Cir. 1994) (*per curiam*); United States v. Atanda, 60 F.3d 196, 199 (5th Cir. 1995) (*per curiam*); United States v. Roberts, 223 F.3d 377, 380-82 (6th Cir. 2000); United States v. Burnett, 66 F.3d 137, 140 (7th Cir. 1995); United States v. Lucht, 18 F.3d 541, 555-56 (8th Cir. 1994); United States v. James, 157 F.3d 1218, 1220 (10th Cir. 1998); United States v. Rodriguez De Varon, 175 F.3d 930, 940-41 (11th Cir. 1999) (*en banc*). Only the Third and Ninth Circuits have disagreed. United States v. Isaza-Zapata, 148 F.3d 236, 240-41 (3d Cir. 1998) (a court must examine all relevant conduct even if defendant is sentenced only for own acts); United States v. Ruelas, 106 F.3d 1416, 1419 (9th Cir. 1997).

district court should have applied the amended version of the commentary since the amendment was merely clarifying.

United States v. Young, 932 F.2d 1510 (D.C. Cir. 1991). The defendant challenged his drug sentence for conspiracy to manufacture and distribute PCP, in violation of 21 U.S.C. § 846. Specifically, he argued on appeal that there was no proof that he abused a "special skill" within the meaning of USSG §3B1.3. The District of Columbia Circuit agreed with the defendant and reversed the district court's sentence. It noted the lack of evidence that the defendant was a "chemist" in the ordinary sense of the term. In fact, there was no evidence the defendant knew anything about any chemical process other than how to manufacture PCP. The court rejected the government's contention that the defendant possessed a "special skill" because the general public does not know how to manufacture PCP. *Id*. at 1512-13. In addition, the court noted that neither the criminal statute nor USSG §2D1.1 distinguishes between the manufacture and the distribution of PCP, thereby suggesting that Congress and the Sentencing Commission determined that, all other things being equal, those who manufacture PCP and those who distribute it deserve equal sentences. Adoption of the government's position, however, would undermine that principle by resulting in an across-the-board divergence in the sentences for the manufacture and distribution of PCP. *Id*. at 1513.

Part C Obstruction

§3C1.1 Obstruction or Impeding the Administration of Justice

United States v. Maccado, 225 F.3d 766 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 1094 (2001). The District of Columbia Circuit held that the obstruction of justice enhancement in USSG §3C1.1 does not require a showing of a substantial effect on the proceedings. *Id.* at 773. After being indicted for possession of false identification with intent to defraud the United States and for making false statements in a passport application, the defendant was ordered to provide a handwriting exemplar to the Government. *Id.* at 768. The defendant failed to comply for 19 days, but did not delay any scheduled proceedings. Thus, the defendant argued on appeal that he should not receive the obstruction of justice enhancement because his delay had no substantial effect on the investigation or prosecution of his case. *Id.* at 767. In the alternative, the defendant argued that any obstruction was cured by his guilty plea. *Id.* at 767. The court held that refusal to comply with a court order compelling out-of-court conduct, such as providing a handwriting exemplar, would tend to frustrate the judicial process and did not justify the heightened requirement that the proceedings be substantially affected. *Id.* at 772. According due deference to the district court's application of the guidelines to the defendant's case, the court affirmed the enhancement for obstruction of justice. *Id.* at 773.

United States v. Monroe, 990 F.2d 1370 (D.C. Cir. 1993). The District of Columbia Circuit held that the district court improperly gave the defendant a two-level upward adjustment for obstruction of justice under USSG §3C1.1. The basis for the section 3C1.1 adjustment was willful failure to appear for her arraignment or to turn herself in. The defendant had presented unrebutted evidence that the letter announcing the arraignment arrived at her address one day after

the hearing took place and thus her initial failure to appear could not have been labeled "willful." As to Monroe's failure to turn herself in, the record indicated that she made affirmative and documented efforts to determine what action was required of her by placing several calls to Pretrial Services. The office failed to answer her questions and did not provide her with explicit instructions. *Id*. at 1376.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

United States v. Forte, 81 F.3d 215 (D.C. Cir. 1996). The district court did not err in denying defendant's request for a two-level reduction in his base offense level for acceptance of responsibility under USSG §3E1.1 because he lied about the extent of his wife's participation in his prison escape. The district court took the view that defendant's lies went beyond a factor to be considered in granting a departure and precluded an acceptance of responsibility reduction. Although the circuit court doubted that the guidelines create an absolute bar to the reduction, it did not resolve the issue. Guideline 3E1.1 Application Note 1 states that a defendant who falsely denies relevant conduct acts in a manner inconsistent with an acceptance of responsibility, but differentiates between "conduct comprising the offense of conviction" and "additional relevant conduct." Both parties argued that the defendant's conduct fell into the "additional relevant conduct" category.

United States v. Jones, 997 F.2d 1475 (D.C. Cir. 1993) (*en banc*). The sentencing judge granted a defendant a two-point downward adjustment for acceptance of responsibility even though the defendant went to trial. The sentencing judge decided, however, not to sentence the defendant to the bottom of the guideline range because he went to trial. The trial court also observed that simply saying after trial, "Yes, you got me this time," is a "rather meager basis upon which I might conclude that he truly was remorseful and had accepted full responsibility." *Id*. at 1476 (citation omitted). The defendant appealed and the District of Columbia Circuit, en banc, affirmed the district court's decision. The court recognized the possibility that the defendant's sentence might have infringed on the defendant's constitutional guarantee to a trial. The court distinguished the enhancement of a sentence for going to trial (which would be unconstitutional) and the withholding of leniency in sentencing (which would be constitutional). In this case, the district court merely exercised its long-standing discretion to show leniency when a defendant has demonstrated contrition. The four-judge dissent was not persuaded by the majority's distinction between increasing a defendant's sentence for exercising his constitutional right to trial (which is impermissible) and giving his less of the benefit allowable for acceptance of responsibility. According to the dissent, regardless of how the action is characterized, it was unconstitutional for the trial judge to de facto increase the defendant's sentence because he chose to go to trial rather than plead guilty.

United States v. Kirkland, 104 F.3d 1403 (D.C. Cir. 1997). The defendant was convicted by a jury of distributing a controlled substance within 1,000 feet of a school. He appealed his sentence because the district court refused to give him a downward adjustment for acceptance of

responsibility under USSG §3E1.1 because he argued to the jury that he had been entrapped. The District of Columbia Circuit affirmed. It reasoned that an entrapment defense is a way of challenging one factual element of guilt–intent. "It has been generally held that a defendant's challenge to the requisite intent is just another form of disputing culpability." *Id*. at 1045 (citations omitted). The court stated that it could think of no hypothetical in which a plea of entrapment was consistent with acceptance of responsibility, but acknowledging a circuit conflict on the issue, stated that "[i]t may be that a situation could be presented in which an entrapment defense is not logically inconsistent with a finding of a defendant's acceptance of responsibility, even though we doubt it." *Id*. at 1406.

United States v. Thomas, 97 F.3d 1499 (D.C. Cir. 1996). The defendant appealed the district court's refusal to grant him a two-point downward adjustment for acceptance of responsibility pursuant to USSG §3E1.1. The defendant went to trial, pleading an entrapment defense. The District of Columbia Circuit noted that Application Note 2 to USSG §3E1.1 states that conviction by trial does not automatically preclude a defendant from consideration for such a reduction, but the application note was not applicable here because the defendant persisted in his entrapment defense from trial through sentencing and offered not one word of remorse, culpability or human error.

United States v. Williams, 86 F.3d 1203 (D.C. Cir. 1996). The appellant challenged the district court's denial of his motion to modify his sentence, filed pursuant to 28 U.S.C. § 2255. He argued that his counsel rendered ineffective assistance by failing to request an additional one-level reduction pursuant to USSG §3E1.1(b)(2). He contended that he was entitled to the third point by having "timely notif[ied] authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently." *Id*. The district court had determined that Williams was not entitled to the additional one-level reduction under USSG §3E1.1(b)(2) because his decision to plead guilty was untimely and did not permit the court to allocate its resources efficiently. The District of Columbia Circuit affirmed, concluding that the district court's determination was not clearly erroneous. It explained that "[a] defendant does not receive the subsection (b)(2) one-level reduction unless the record manifests that he assisted the government with sufficient timeliness to (1) permit the prosecution to avoid trial preparation *and* (2) permit the court to allocate its resources efficiently. 86 F.3d at 1206 (emphasis in original).

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.2 Definitions and Instructions for Computing Criminal History

United States v. Johnson, 28 F.3d 151 (D.C. Cir. 1994). The district court did not err in considering the defendant's juvenile record when determining his criminal history. The defendant argued that the Commission exceeded its statutory authority under 28 U.S.C. §994 when it included juvenile adjudications in the criminal history provisions because the District of Columbia code states that a juvenile adjudication "is not a conviction of a crime." D.C. Code Ann. § 16-2318. The circuit court disagreed. Whether a juvenile adjudication is a "conviction" is of little moment since what is relevant is that a provision of criminal law was violated. Juvenile records are relevant for purposes of calculating a defendant's criminal history since recidivism generally warrants increased punishment. Accordingly, the Commission did not exceed its statutory authority.

United States v. McDonald, 991 F.2d 866 (D.C. Cir. 1993). The defendant appealed his sentence, contending that a juvenile conviction he received should not have been included in his criminal history calculation. Although USSG §4A1.2(j) provides that sentences for "expunged convictions" are not counted in the criminal history calculation, the defendant's juvenile conviction had not been "expunged." Rather, the conviction had been "set aside" pursuant to the District of Columbia Youth Rehabilitation Act. The District of Columbia Circuit affirmed the sentence, distinguishing between "set aside" and "expunged" convictions. In doing so, the court relied primarily on application note 10, which provides in pertinent part, "[a] number of jurisdictions have various procedures pursuant to which previous convictions may be set aside . . . Sentences resulting from such convictions are to be counted. However, expunged convictions are not counted." 991 F.2d at 871 (quoting USSG §4A1.2, comment. (n.10)). The District of Columbia Circuit acknowledged that the Ninth Circuit has reached a different conclusion on the issue, but distinguished the California statute because it expressly provides that if a court "set[s] aside" a juvenile's conviction, the youth is "released from all penalties and disabilities resulting from the offense." *Id*. at 872 (citation omitted). In contrast, the District of Columbia Youth Rehabilitation Act contains no such provision.

§4A1.3 Adequacy of Criminal History Category

In re Sealed Case, 199 F.3d 488 (D.C. Cir. 1999). The defendant pled guilty to several counts of cocaine possession and distribution and she was sentenced under the career offender guideline. *Id*. at 488-89. In response to defense counsel's complaints about the harshness of the sentencing range, the district court responded that it wished it could sentence the defendant to less than the guidelines demanded, but that a long sentence was needed and there was no alternative. *Id*. at 489. At sentencing, the defendant contested portions of her presentence report and requested leniency in the imposition of her sentence. However, the defendant never requested a departure under USSG §4A1.3, which allows for a downward departure if the "criminal history category

significantly over-represents the seriousness of a defendant's criminal history or likelihood that the defendant will commit further crimes." *Id.* at 489 (quoting §4A1.3). On appeal, defendant argued that the district court's comments demonstrated that it was under the mistaken belief that it lacked authority to depart under USSG §4A1.3. *Id.* at 489. Evaluating the comments in the context of the transcript, the circuit court concluded that the district court did not mean that it could not impose a lower sentence, but rather that it could not do so with a clear conscience. *Id.* at 491. The court dismissed the defendant's appeal for lack of jurisdiction after concluding that the district court's comments did not indicate a belief that it lacked authority to depart downwards under USSG §4A1.3. *Id.* at 492.

United States v. Spencer, 25 F.3d 1105 (D.C. Cir. 1994). The district court refused to depart downward from the guidelines pursuant to USSG §4A1.3, but subsequently departed from the career offender provisions of the sentencing guidelines to impose a lower sentence at the statutory ten-year minimum, based on constitutional grounds previously rejected by the circuit or the Supreme Court. This constituted error. Although the Third and Fourth Circuits do not require the district court to find "an aggravating or mitigating circumstance of a kind, or to a degree not adequately taken into consideration by the Commission," before the court can depart pursuant to USSG §4A1.3, the Supreme Court as well as the First and Tenth Circuits suggest that a court may only depart from the sentencing range provided in the guidelines pursuant to USSG §5K2.0. Because the district court failed to adequately address why it did not depart downward under USSG §4A1.3, and because it is unclear whether on remand the court will get to the point of exercising or refusing to exercise its discretion to depart under USSG §4A1.3, the circuit court chose not to address the conflict.

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. McCoy, 215 F.3d 102 (D.C. Cir. 2000). The District of Columbia Circuit held that counsel's assistance was constitutionally ineffective where, but for counsel's miscalculation of the career offender guideline, there was a reasonable probability that the defendant would not have pled guilty. The defendant pled guilty to conspiring to distribute and to possess with intent to distribute cocaine base. Following the denial of a motion to withdraw his guilty plea, the defendant appealed, arguing that his plea was involuntary as it was based upon legal advice that fell below the level of reasonable competence, depriving him of his constitutional right to assistance of counsel. *Id.* at 107. Counsel had miscalculated the career offender guideline and told defendant that by pleading guilty he would receive a sentence within the range of 188 to 235 months, when he actually faced a sentence of 262 to 327 months. *Id.* at 108. The court conceded that an error in applying the guidelines will not always amount to ineffective assistance of counsel, but added that "familiarity with the structure and basic content of the guidelines (including the definition and implications of career offender status) has become a necessity for counsel who seek to give effective representation. *Id.* at 108 (quoting United States v. Day, 969 F.2d 39, 43 (3d Cir. 1992)). The court held that the defendant satisfied both prongs of the Strickland test for ineffectiveness: (1) that counsel's performance "fell below an objective

standard of reasonableness;" and (2) that there was a "reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have gone to trial." 215 F.3d at 107 (quoting Strictland v. Washington, 466 U.S. 668 (1984)). The court remanded the case with instructions that the defendant be allowed to withdraw his plea. *Id.* at 108-09.

United States v. Webb, 255 F.3d 890 (D.C. Cir. 2001). The defendant argued that his sentence constituted plain error because he was sentenced under the career offender guideline, 4B1.1, using the maximum sentence of life from section 841(b)(1)(A) and (B), both of which required that drug quantity be submitted to the jury under Apprendi, as the basis for the calculation. However, because the evidence of drug quantity was "overwhelming and uncontroverted," the court found that the error did not "seriously affect the fairness, integrity or public reputation of judicial proceeding" and did not constitute grounds for reversal under the 4-prong plain error analysis. Because the underlying convictions survived plain error analysis, the application of the career offender guideline by the district court was not in error.

CHAPTER FIVE: *Determining the Sentence*

Part C Imprisonment

§5C1.2 Limitation on Applicability of Statutory Minimum Sentence in Certain Cases

United States v. Evans, 216 F.3d 80 (D.C. Cir.), *cert. denied*, 531 U.S. 971 (2000). The defendant, who was convicted of numerous drug charges, argued on appeal that he should have received the benefit of the USSG §5C1.2 safety valve provisions and a downward departure for extraordinary family circumstances. *Id.* at 91. The court found that there was ample evidence that the defendant had not been forthcoming or truthful in providing evidence to the Government. *Id.* at 91. Because the district court was aware that it had the discretion to grant a downward departure and thought such a departure was unwarranted, the circuit court upheld that decision. *Id.* at 91.

United States v. Mathis, 216 F.3d 18 (D.C. Cir.), *cert. denied*, 531 U.S. 972 (2000). The defendant was convicted of conspiracy to distribute and possession with intent to distribute heroin and cocaine. The court upheld the denial of the section 5C1.2 safety valve provision for a defendant who met four of the five requirements but had not provided any information to the Government. The defendant argued that he had no useful information and that the Government had indicated that a debriefing would be futile. *Id.* at 29. Although USSG §5C1.2(5) does not require that the information provided be useful, there was no disclosure at all on the part of the defendant and the court held that the district court did not clearly err. *Id.* at 29.

In re Sealed Case (Sentencing Guidelines' "Safety Valve"), 105 F.3d 1460 (D.C. Cir. 1997). The defendant pled guilty to conspiring to distribute and possess with intent to distribute 500 grams or more of cocaine in violation of 21 U.S.C. § 846. The defendant appealed the district court's denial of the "safety valve." Codified at 18 U.S.C. 1 3553(f), the safety valve waives the statutory mandatory minimum penalties for defendants who meet five criteria. See also USSG §5C1.2. The district court denied the safety valve because it found that both the defendant and his

brother were "responsible for having a gun to protect the drugs and/or the money that they would get." 105 F.3d at 1462 (citation omitted). The District of Columbia Circuit vacated the defendant's sentence and remanded to the district court for resentencing in accord with the safety valve. The District of Columbia Circuit inferred that the district court must have relied on either co-conspirator liability or constructive possession in finding that the defendant possessed the gun discovered in his brother's car. It then reversed the district court's finding on both legal theories. Based upon application note 4 to section 5C1.2, the District of Columbia Circuit held that co-conspirator liability cannot establish possession under the Guidelines' safety valve. 105 F.3d at 1462-63.[3] It also found that the defendant did not constructively possess his brother's gun because one of the usual factors establishing the ability to exercise dominion and control–the defendant's proximity to the contraband–is missing in this case. *Id*. at 1464. The defendant remained in the restaurant during the drug transaction while the gun was located in the car. Nor does anything in the record suggest that he was anywhere near the gun immediately prior to the sale. *Id*.

Part G Implementing The Total Sentence of Imprisonment

§5G1.3 Imposition of Sentence on Defendant Subject to Undischarged Term of Imprisonment

United States v. Sobin, 56 F.3d 1423 (D.C. Cir. 1995). The appellate court affirmed the district court's decision to impose the six concurrent bankruptcy fraud sentences to run consecutively to the state sentences for sexual offenses involving children. "Because the five sexual offense sentences did not result at all from conduct taken into account here, the district court properly imposed fully consecutive sentences as 'reasonable incremental punishment' for the instant offenses."

[3]This is the subject of a circuit conflict. *Contra* United States v. Hallum, 103 F.3d 87, 89 (10th Cir. 1996) (defendant precluded from safety valve based upon co-conspirator's possession of firearm because Application Note 4 holds defendant responsible for conduct he "aided and abetted" and refers to USSG §1B1.3, implicitly including USSG §1B1.3(a)(1)(B)'s broader definition of relevant conduct, *to wit*, all "reasonably foreseeable acts and omissions in furtherance of jointly undertaken criminal activity").

Part K Departures

§5K1.1 Substantial Assistance to Authorities (Policy Statement)

In re Sealed Case, 244 F.3d 961 (D.C. Cir. 2001). The District of Columbia Circuit held that the district court did not err in denying the defendant's motion to compel the Government to file a USSG §5K1.1 motion for a downward departure for substantial assistance when the Departure Guideline Committee refused to authorize the filing. The defendant entered into a plea agreement with the Government in which he agreed to plead guilty to two counts and cooperate with the Government in other relevant matters in exchange for the Government dropping five remaining charges and informing the Departure Committee of any assistance tendered that might qualify the defendant for a downward departure. The defendant provided testimony in one case and helped to secure superceding indictments against several other defendants, but refused to testify at the last minute in a second case, allegedly out of fear for himself and his family. The prosecutor informed the Departure Committee of the extent of the defendant's cooperation in the relevant cases and recommended that they authorize the a USSG §5K1.1 motion for a "modest departure." The Departure Committee refused without offering any reason for its denial. On the theory that the Government had breached the plea agreement, the defendant filed a motion to compel the Government to file the motion. The district court denied the motion and imposed the sentence with no downward departure. The court upheld the district court's denial, stating that the decision to file the USSG §5K1.1 motion is largely within the Government's discretion. Without an explanation from the Departure Committee or an objective standard for definition "substantial assistance," the court could not presume that the Committee violated the plea agreement.

In re Sealed Case, 204 F.3d 1170 (D.C. Cir. 2000). In an agreement with the Government, the defendant pleaded guilty to one count of a ten-count indictment and was sentenced to 57 months' imprisonment. Although in District of Columbia Superior Court the defendant had provided the Government with information concerning a homicide case, the Government did not request a substantial assistance departure under USSG §5K1.1. *Id.* at 1172. On appeal, the defendant contended that the district court should have granted a departure under USSG §5K2.0, because the assistance he had rendered fell outside the "heartland" of USSG §5K1.1. *Id.* at 1172. The defendant argued that USSG §5K1.1 covered assistance in the investigation and prosecution of federal crimes, and therefore the district court had the authority to depart without a motion by the Government. *Id.* at 1172. Because the defendant did not present this argument in district court, the circuit court held that the issue had been waived and reviewed the sentence for plain error only. *Id.* at 1173. The court concluded that the term "offense" in USSG §5K1.1 need not be limited to federal offenses, especially in the District of Columbia where the U.S. Attorney prosecutes federal and local crimes and has the authority to join local charges with federal ones. *Id.* at 1174. The court further held that the district court did not plainly err in denying the defendant's request for a downward departure. *Id.* at 1174.

§5K2.0 Grounds for Departure (Policy Statement)

United States v. Smith, 27 F.3d 649 (D.C. Cir. 1994). The district court erred in concluding that it did not have the authority to depart downward based on the likelihood that the defendant would face more severe prison conditions because of his status as a deportable alien. The defendant was a Jamaican citizen who entered the United States illegally and who pled guilty to possession with intent to distribute cocaine in violation of 21 U.S.C. § 841. He argued that he was entitled to a downward departure because his deportable alien status rendered him ineligible to serve any portion of his sentence in a minimum security prison or under house confinement. In addressing this issue, the court of appeals first concluded that the provisions of Chapter Five, Part H and 18 U.S.C. § 3553(b) reach aggravating and mitigating factors that relate to the offender as well as to "moral blameworthiness." *See, e.g.*, §§5H1.1, 5H1.4 (extreme age or disability may be appropriate downward departure factor when lesser form of incarceration may be equally efficient as prison). Thus, the Bureau of Prisons limitations on a deportable alien's access to minimum security facilities and to home confinement fall under possible mitigating circumstances. The court of appeals found that a downward adjustment "in anticipation of the Bureau's application of assignment policies, is [no] more of a disapproval or encroachment than was the departure made in Lara in anticipation of the defendant's expected assignment to solitary." Further, if the Bureau's policies are to ensure that the defendant's status as a deportable alien would not be defeated by his escape, then defendant's status does increase the severity of the sentence and may justify a downward departure. However, the "severity must be substantial and the sentencing court must have a high degree of confidence that it will in fact apply for a substantial portion of the defendant's sentence." The case was remanded for resentencing and the district court's consideration of whether any departure is appropriate.

§5K2.7 Disruption of Governmental Function (Policy Statement)

United States v. Root, 12 F.3d 1116 (D.C. Cir. 1994). The defendant, an attorney representing clients before the Federal Communications Commission, pleaded guilty to wire fraud in violation of 18 U.S.C. § 1343 and altering or forging public records in violation of 18 U.S.C. § 494. The circuit court affirmed the district court's two-level upward departure based upon disruption of a government function. Although the district court also relied on improper factors, "[r]emand is not automatically required when a trial court has relied in part on improper factors in reaching a sentence under the guidelines. Rather, we may affirm such a sentence if we determine `on the record as a whole, that the error was harmless, *i.e.*, that the error did not affect the district court's selection of the sentence imposed.'" *Quoting* Williams v. United States, 112 S. Ct. 1112 (1992).

§5K.13 Diminished Capacity (Policy Statement)

United States v. Draffin, 286 F.3d 606 (D.C. Cir. 2002). The District of Columbia Circuit held that the district court's failure to depart downward *sua sponte* when not requested by the defendant did not constitute plain error. The court, however, recognized one "unlikely circumstance–and there may conceivably be others–in which plain error might be shown: namely,

when, notwithstanding the defendant's silence, the sentencing court makes it plain on the record *sua sponte* that it is choosing not to depart on a particular ground because it believes (mistakenly, as it turns out) it lacks authority to do so. *Id*. at 610. Nevertheless, the court held that in this case no such error occurred.

United States v. Greenfield, 244 F.3d 158 (D.C. Cir. 2001). The district court's denial of a USSG §5K2.13 downward departure for diminished capacity based upon defendant's depression did not constitute error. The defendant pled guilty to conspiracy to possess with intent to distribute cocaine base. At sentencing, the defendant filed a memorandum alleging that he suffered from depression, and that his mental state contributed to his commission of the offense. *Id*. at 159. After hearing the expert testimony on the defendant's mental state, the court denied the motion, stating that the testimony "mandates that the court not take into consideration diminished capacity." *Id*. at 160 (citing Sentencing Hr'g Tr. at 52). The district court denied the defendant's request for departure and sentenced the defendant to 60 months. On appeal, the defendant argued that if drug addiction contributed only in part to the defendant's commission of the crime, then it should not preclude a departure because the defendant's mental state could also have played a role. *Id.* at 162. The court found that the district court had not focused on the defendant's addiction, but rather on whether the defendant's depression had *significantly* diminished his mental capacity. *Id.* at 162. Because the expert had not provided adequate testimony that the defendant's mental capacity had been significantly diminished, and the district court clearly understood its authority to depart, the court affirmed the district court decision. *Id.* at 162.

CHAPTER SIX: *Sentencing Procedures and Plea Agreements*

Part B Plea Agreements

United States v. Goodall, 236 F.3d 700 (D.C. Cir. 2001). The District of Columbia Circuit held that a district court can, in its discretion, accept a Rule 11(e)(1)(C) plea agreement stipulating to a sentence below the range assigned by the sentencing guidelines. The defendant pled guilty to one count of possession with intent to distribute heroin in exchange for the Government's agreement to drop seven other drug charges. *Id.* at 701. The Rule 11(e)(1)(C) plea agreement specified a sentencing range of 57 to 71 months and the Government recommended a sentence at the bottom of that range. The presentence report recommended a guideline range of 70 to 87 months. *Id*. at 702. The district court, believing it was bound by both the guidelines and the plea agreement that it had accepted, only considered sentences at a sentencing range of 70 to 71 months. *Id*. at 702. The circuit court held that, by not considering sentences between 57 and 69 months, the district court had impermissibly altered the plea agreement. *Id.* at 703, 706. While the First and Sixth Circuits held that USSG §6B1.2 restricts a court's discretion under Rule 11(e), the District of Columbia Circuit joined the remaining circuits in holding that USSG §6B1.2 does not limit the court's otherwise broad discretion under Rule 11. Although the language of USSG §6B1.2 mandates that the guidelines be followed, the policy statements to the guideline and the Introduction to the Guidelines Manual indicate that it is intended only as a guide to courts in deciding whether to accept a Rule 11(e) plea agreement. *Id*. at 704. The court vacated the sentence and remanded for re-sentencing. It instructed the district court that, if it intended to

accept the plea agreement, it should consider the range of 57 to 71 months, and if it intended to reject the plea agreement in favor of the guideline calculation, then the defendant should be allowed to withdraw his plea. *Id.* at 706.

CHAPTER SEVEN: *Violations of Probation and Supervised Release*

Part B Probation and Supervised Release Violations

§7B1.3 Revocation of Probation or Supervised Release (Policy Statement)

United States v. Bruce, 285 F.3d 69 (D.C. Cir. 2002) (*per curiam*). The District of Columbia Circuit had previously held that Chapter Seven policy statements are not mandatory. United States v. Hooker, 993 F.2d 898 (D.C. Cir. 1993). A year later, Congress amended 18 U.S.C. § 3553 to clarify that resentencing for probation and supervised release should be based upon sentencing guidelines and policy statements issues by the Commission specifically for that purpose, rather than upon the guidelines applicable to . . . the original offense. In Bruce, the District of Columbia Circuit reaffirmed Hooker notwithstanding the 1994 amendment to section 3553. It reasoned that the plain language of the post-1994 law merely states that a district court must "*consider* . . . the applicable guidelines or policy statements issued by the Sentencing Commission" when imposing a sentence for a violation of supervised release. Bruce, 285 F.3d at 73 (emphasis in original).

OTHER STATUTORY CONSIDERATIONS

18 U.S.C. § 841

United States v. Budd, 23 F.3d 442 (D.C. Cir. 1994). The district court erred in failing to sentence the defendant pursuant to the statutory minimum sentence provided in 21 U.S.C. § 841(b)(1)(B). The defendant was convicted of distribution of cocaine in violation of 21 U.S.C. § 841(a). Although he had a prior conviction in District of Columbia Superior Court for attempted possession with intent to distribute PCP, the district court concluded that the statutory minimum did not apply because there was "no federal crime of an attempt to possess with the intent to distribute narcotics [and thus] Budd's conduct did not rise to the level of a federal crime." The circuit court reversed. First, 21 U.S.C. § 846 specifically criminalizes attempts to possess with intent to distribute a controlled substance. Second, a plain reading of section 841 illustrates that it applies equally to felony violations of the District of Columbia laws. Goode v. Markley, 603 F.2d 973 (D.C.Cir. 1979), *cert. denied*, 444 U.S. 1083 (1980); *see also* D.C. Code § 23-101. Congress additionally extended the mandatory minimum provision to prior state drug convictions in 1984. Most importantly, however, the defendant's attempted possession with intent to distribute PCP is a prior felony within the meaning of the statute requiring the imposition of the statutory minimum.

28 U.S.C. § 994

See United States v. Johnson, 28 F.3d 151 (D.C. Cir. 1994), p. 12.

Post-*Apprendi (Apprendi v. New Jersey, 530 U.S. 466 (2000))*

United States v. Agramonte, 276 F.3d 594 (D.C. Cir. 2001). The court held that failure to submit the drug quantity question to the jury violated Apprendi for defendant's convictions under 21 U.S.C. §§ 841 and 846, but did not violate Apprendi for his conviction of unlawful possession with intent to distribute heroin within 1000 feet of a school, 21 U.S.C. § 860. In addition, the court rejected defendant's contentions that Apprendi applies to a court's determination of a leadership role adjustment under USSG §3B1.1 and to sentences that trigger a mandatory minimum sentence.

United States v. Fields, 251 F.3d 1041 (D.C. Cir. 2001). The District of Columbia Circuit granted a rehearing in this case to clarify its earlier decision in United States v. Fields, 242 F.3d 393 (D.C. Cir. 2001). (Fields I) The defendant was convicted on numerous counts, including narcotics conspiracy and RICO conspiracy. On appeal, the defendant argued that the district court committed plain error when it sentenced defendant to a life term for the narcotics conspiracy charge without submitting the drug quantity to the jury as required by Apprendi. The Government argued that the drug quantity issue was not reversible error because it had been supported by "overwhelming proof." In the alternative, the Government argued that the life sentence imposed for the RICO count constituted a "statutorily available sentence" under Apprendi. The court disagreed that the evidence of drug quantity had been "overwhelming" as it rested on vague admissions by the defendant and "imprecise testimony"of cooperating witnesses. The court did agree that the RICO sentence would be a "statutorily available sentence" if it had been premised on the racketeering act of armed kidnapping.

In re Sealed Case, 246 F.3d 696 (D.C. Cir. 2001). The defendant pled guilty to unlawful possession of a firearm in violation of 18 U.S.C. § 922. The district court applied the four-level enhancement under USSG §2K2.1 because the defendant had threatened to shoot someone while he was in possession of the firearm. The defendant received a sentence of 48 months on the count of firearm possession, well below the statutory maximum of ten years. On appeal, the defendant argued that the gun threat should have been proved beyond a reasonable doubt to comply with Apprendi. The court upheld the district court decision and held that Apprendi is not applicable to sentences that trigger a mandatory minimum sentence. *Id*. at 698.

United States v. King, 254 F.3d 1098 (D.C. Cir. 2001). A jury found the defendant guilty of possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g). The defendant's applicable guideline range was enhanced because of the existence of the defendant's two prior convictions and because the firearm the defendant possessed was stolen. The district court imposed the maximum sentence available, 120 months for violation of 18 U.S.C. § 922(g). On appeal, the defendant argued that this sentence violated the Supreme Court's holding in Apprendi because the judge relied upon guideline enhancements at sentencing that had not been submitted to the jury. The court rejected this argument, reiterating that Apprendi did not constrain the district court's application of the guideline enhancements when the resulting sentence did not exceed the statutory maximum.

United States v. Webb, 255 F.3d 890 (D.C. Cir. 2001). The District of Columbia Circuit held no Apprendi violation where the sentence was increased beyond the statutory maximum due to the existence of prior convictions. The defendant was convicted of distributing and possessing with intent to distribute cocaine base in violation of 21 U.S.C. § 841. The defendant was sentenced under the career offender guideline, §4B1.1, because of the existence of two prior felony drug convictions and received a base offense level of 37. Although he could have received up to life imprisonment, the district court sentenced him to 30 years, at the bottom of the guideline range. The defendant argued on appeal that, because the issue of drug quantity was not submitted to the jury and his sentence exceeded the 20-year maximum sentence for section 841(b)(1)(C) (the only section for which drug quantity need not be treated as an element), his sentence constituted plain error under Apprendi. The court notes that section 841(b)(1)(C) increased the maximum sentence to 30 years where the offense was committed after the conviction of another felony drug offense. Because Apprendi left undisturbed the judge's ability to determine whether there was a prior conviction, using the enhanced section 841(b)(1)(C) maximum was appropriate. Therefore, the defendant's sentence did not exceed the statutory maximum and there could be no error on those grounds.